A

Public Prosecutor v Hans Philip

B HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45B-62–12 OF 2014
ZULKIFLI BAKAR J
14 MARCH 2017

C *Criminal Law — Offences — Murder — Accused charged under s 302 of the Penal Code — Whether there were material gaps in prosecution's case — Whether accused caused injuries to deceased — Whether prima facie case proven*

D *Evidence — Adverse inference — Failure of prosecution to call material witness — Accused charged under s 302 of the Penal Code — Whether adverse inference under s 114(g) of the Evidence Act 1950 ought to be invoked for non-calling of material witnesses*

E

Evidence — Hearsay — Admissibility — Accused charged under s 302 of the Penal Code — Prosecution sought to adduce statements of witnesses who were not called upon to give evidence in trial under s 32(1)(i) of the Evidence Act 1950 — Whether requirement of s 32 of the Evidence Act 1950 fulfilled — Whether F *statements admissible — Evidence Act 1950 ss 32 & 114(g) — Penal Code ss 300 & 302*

The accused was charged with the offence of murder of one Zulkefi bin Jalil ('the deceased') under s 302 of the Penal Code. The facts of the case were that, G the deceased was found injured in front of a pub located in Klang, Selangor. The prosecution relied on the evidence of one Azman bin Atan ('PW7') who testified that he was suspicious about a group of teenagers ('the said teenagers') who were drinking and spoke in 'Bahasa Sabah and Indonesia' and had been acting so aggressive and caused disturbances to the customers inside the pub. H The prosecution also sought to adduce the statements ('IDP99, IDP100 and IDP 101') of three witnesses who could not be called upon to give evidence in the trial under s 32(1)(i) of the Evidence Act 1950 ('the Act') for the admissibility of those statements. To prove the admissibility of the statements, I the prosecution called ASP Azmi Shah bin Abd Aziz ('PW1') as the only witness. The issues raised by the accused were in relation to: (a) information leading to the discovery of weapons such as knife and chopper ('the said weapons'); (b) usage of the vehicle bearing registration No CCL 8412 ('P59'); and (c) adverse inference under s 114(g) of the Act.

Held, acquitting and discharging the accused without calling for his defence:

(1) With regards to IDP99, as shown in PW1's investigation diary, PW1 had failed to conduct a prompt investigation since he had taken too long a time that was two years before any attempt to trace the first witness was taken. In relation to IDP100, the prosecution had failed to prove that the second witness could not be found and alternatively, there was an inordinate and excessive delay of time for PW1 to exercise steps to secure the attendance of the second witness for the trial. As for IDP101, there were unreasonable amount of delay and lack of effort by PW1 in taking any attempt to procure the presence of the third witness. In totality, the requirement of s 32 of the Act was not fulfilled, as such, IDP99, IDP100 and IDP101 were not admissible (see paras 11–12, 19 & 22).

(2) Based on the facts, PW7 had not witnessed the fateful event outside the pub. The court could not find any circumstantial evidence produced by the prosecution to indicate any wrongful conduct of the accused at the pub to close the gap in the case. More importantly, the accused was not conclusively identified to have caused the injuries on the deceased. There was no evidence whether the said teenagers had attacked the deceased or otherwise and whether the accused was amongst or one of the teenagers (see para 27).

(3) The evidence of the discovery of the weapons were not significant because there was no detection of any DNA profile or fingerprint found on the said weapons (see para 32).

(4) Based on the facts of the case, the accused was not the only person having the custody, control and usage of P59. Even the weapons were found in P59, it did not point to the accused alone to have placed them there. There was no evidence produced by the prosecution that the accused was the driver and having absolute custody and control over P59 at that material time (see paras 33–34).

(5) The case for the prosecution had material gaps and the non-calling of the three witnesses was fatal to the prosecution's case. Adverse inference under s 114(g) of the Act ought to be invoked against the prosecution for non-calling of the three witnesses who were material witnesses for the prosecution to prove the murder charge against the accused. On the maximum evaluation of the prosecution's evidence, the court found that the prosecution had not established prima facie case against the accused. The prosecution had failed to establish that the accused had caused the said injuries on the deceased (see paras 37 & 39–40).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana kesalahan membunuh Zulkefi bin Jalil ('si mati') di bawah s 302 Kanun Keseksaan. Fakta kes adalah, si mati dijumpai

cedera di hadapan sebuah pub yang terletak di Klang, Selangor. Pendakwaan bergantung kepada keterangan Azman bin Atan ('PW7') yang memberi keterangan bahawa dia berasa syak wasangka tentang kumpulan remaja ('remaja tersebut') yang minum arak dan bercakap dalam 'Bahasa Sabah dan Indonesia' dan berkelakuan kasar dan menyebabkan gangguan kepada pelanggan-pelanggan dalam pub itu. Pendakwaan juga memohon untuk dikemukakan kenyataan-kenyataan ('IDP99, IDP100 and IDP101') ketiga-tiga saksi yang tidak boleh dipanggil untuk memberikan keterangan dalam perbicaraan di bawah s 32(1)(i) Akta Keterangan 1950 ('Akta tersebut') bagi kebolehterimaan kenyataan-kenyataan tersebut. Bagi membuktikan kebolehterimaan kenyataan-kenyataan tersebut, pendakwaan telah memanggil ASP Azmi Shah bin Abd Aziz ('PW1') sebagai satu-satunya saksi. Isu-isu yang ditimbulkan oleh tertuduh adalah berkaitan kepada: (a) maklumat yang membawa kepada penemuan senjata-senjata seperti pisau dan parang ('senjata-senjata tersebut'); (b) penggunaan kenderaan yang mempunyai nombor pendaftaran CCL 8412 ('P59'); dan (c) inferens bertentangan di bawah s 114(g) Akta tersebut.

Diputuskan, melepas dan membebaskan tertuduh tanpa memanggil untuk pembelaannya:

(1) Berhubung IDP99, sepertimana ditunjukkan dalam diari siasatan PW1, PW1 telah gagal untuk melakukan siasatan segera oleh kerana dia mengambil masa terlalu lama iaitu dua tahun sebelum apa-apa percubaan untuk mencari saksi pertama diambil. Berkaitan IDP100, pendakwaan telah gagal untuk membuktikan bahawa saksi kedua tidak boleh ditemui dan secara alternatif, berlaku kelewatan yang keterlaluan dan melampau untuk PW1 melakukan langkah-langkah untuk menjamin kehadiran saksi kedua untuk perbicaraan. Berhubung IDP101, berlaku kelewatan yang tidak munasabah dan tiada usaha oleh PW1 untuk menjamin kehadiran saksi ketiga. Secara keseluruhan, keperluan s 32 Akta tersebut tidak dipenuhi, oleh itu, IDP99, IDP100 dan IDP101 tidak boleh diterma (lihat perenggan 11–12, 19 & 22).

(2) Berdasarkan fakta, PW7 tidak menjadi saksi kepada kejadian tersebut di luar pub itu. Mahkamah tidak mendapati ada apa-apa keterangan mengikut keadaan yang telah dikemukakan oleh pendakwaan untuk menunjukkan apa-apa perilaku salah oleh tertuduh di pub itu untuk menutup jurang dalam kes tersebut. Lebih penting lagi, tertuduh tidak dikenalpasti secara konklusif yang menyebabkan kecederaan ke atas si mati. Tiada keterangan sama ada remaja-remaja tersebut telah menyerang si mati atau sebaliknya dan sama ada tertuduh adalah antara atau salah satu daripada remaja tersebut (lihat perenggan 27).

(3) Keterangan berhubung penemuan senjata-senjata tersebut tidak penting kerana tiada apa-apa profil DNA atau cap jari yang ditemui pada

senjata-senjata tersebut (lihat perenggan 32).

(4) Berdasarkan fakta kes, tertuduh bukan sahaja orang yang mempunyai jagaan, kawalan dan penggunaan P59. Walaupun senjata-senjata tersebut dijumpai dalam P59, ia tidak menunjukkan kepada tertuduh sahaja yang meletakkannya di situ. Tiada keterangan yang dikemukakan oleh pendakwaan bahawa tertuduh adalah pemandu dan mempunyai jagaan dan kawalan mutlak ke atas P59 pada masa matan (lihat perenggan 33–34).

(5) Kes untuk pendakwaan mempunyai jurang yang material dan saksi-saksi yang tidak dipanggil adalah memudaratkan kepada kes pendakwaan. Inferens bertentangan di bawah s 114(g) Akta tersebut patut digunakan terhadap pendakwaan kerana tidak memanggil ketiga-tiga saksi yang merupakan saksi-saksi penting untuk pendakwaan membuktikan pertuduhan membunuh terhadap tertuduh. Atas penilaian maksimum keterangan pendakwaan, mahkamah mendapati pendakwaan telah gagal untuk membuktikan kes prima facie terhadap tertuduh. Pendakwaan telah gagal untuk membuktikan bahawa tertuduh telah menyebabkan kecederaan tersebut ke atas si mati (lihat perenggan 37 & 39–40).]

Notes

For cases on admissibility, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2144–2153.

For cases on failure of prosecution to call material witness, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 402–412.

For cases on murder, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 1911–1919.

Cases referred to

Amri bin Ibrahim & Anor v PP and another appeal [2017] 1 MLJ 1, FC (refd)

Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)

Mahadzir bin Yusof & Anor v PP [2011] 1 MLJ 297, CA (folld)

Mustapha bin Awang Besar lwn Pendakwa Raya [2015] 3 MLJ 347; [2015] 1 LNS 52, CA (refd)

PP v Jitweer Singh a/l Ojagar Singh [2014] 6 MLJ 222; [2014] 1 CLJ 433, FC (refd)

PP v Lee Eng Kooi [1993] 2 MLJ 322, HC (refd)

PP v Lee Jun Ho & Ors [2009] 3 MLJ 400, HC (refd)

PP v Mogan Ayavoo [2004] 3 CLJ 623, HC (refd)

PP v Mohamed Said [1984] 1 MLJ 50 (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576; [1992] 3 CLJ Rep 408, HC (refd)

PP v Norfaizal bin Mat (No 2) [2008] 7 MLJ 792, HC (folld)

Sia Soon Suan v PP [1966] 1 MLJ 116, FC (refd)

A *Sim Tiew Bee v PP* [1973] 2 MLJ 200, FC (refd)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)

Legislation referred to

B Evidence Act 1950 ss 27, 32, 32(1), 32(1)(i), 114(g)
Criminal Procedure Code ss 49, 112
Immigration Act 1959/63 s 6(1)(c)
Penal Code s 300(c)

C *Noor Husnita bt Mohd Radzi (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.*
Murali Velautham (Murali Velautham & Assoc) for the accused.

Zulkifli Bakar J:

D INTRODUCTION

[1] The accused was charged in the High Court of Shah Alam for an offence of murder and the charge ('P2') against the accused in this trial read as follows:

E > Bahawa kamu pada 9 Mac 2014, jam lebih kurang 3.40 pagi bertempat di hadapan premis yang beralamat di 59, Persiaran Raja Muda Musa, Pelabuhan Klang, di dalam daerah Klang, di dalam Negeri Selangor Darul Ehsan telah melakukan bunuh terhadap Zulkefli bin Jalil (No K/P 671116-10-6197) dan oleh yang demikian kamu telah meslakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

F

THE CASE FOR THE PROSECUTION

[2] The brief facts are as follows. On 8–9 March 2014 at around 11pm–4am at the scene, Azman bin Atan ('PW7') was working as cashier and was informed by one 'Ana' that there was someone injured outside the pub, which was infront of the pub door at its interior part. PW7 went to have a look and found the person ('the deceased') was so severely injured with bloodstain and was leaning against the staircase leading up to the pub's entrance.

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H

[3] L/KPL Mohd Noor Khahaizilali received call from Mohd Latiff bin Hassan ('PW10'), the bartender informing him that there was a man without identification document injured in front of the pub and later confirmed as the deceased ('police report P8').

I

[4] On 10 March 2014, Dr Nur Ayutimasery bt Abdullah ('PW1'), a consultant forensic pathologist who worked in Hospital Tengku Ampuan Rahimah, Klang since year 2010, had performed post-mortem examination on the deceased and handed the clothing and specimens of the deceased to PW9.

PW1 confirmed in her autopsy report ('P35') that the deceased had sustained injuries with pattern consistent with sharp force trauma and the multiple stab wounds inflicted to the heart was fatal in nature; and

(a) the deceased's body was positively identified by his brother, Azmi bin Jalil ('PW3') before the post-mortem was conducted by PW1. The deceased was also confirmed to have died on 9 March 2014 at about 3.40am.

[5] On 16 March 2014, acting on information, ASP Mohd Iqbal ('PW4'), the raiding officer had arrested the accused and another Lan bin Sumeng at Blok K, Flat Sri Angkasa, Taman Bayu Perdana Pandamaran who were about to enter the vehicle of Black Nissan Frontier bearing registration No CCL 8412 ('P59'). PW4 and his team further confiscated the said vehicle ('P59') ('police report P63'). The said Lan bin Sumeng who had been arrested together with the accused, was not charged under P2.

[6] The accused then led PW4 and his team to P59 where the knife (P57(B)) was found hidden. The accused then provided further information to the police leading to the discovery of two other weapons ie the choppers (P58(E) — 'parang bersarung merah' and P58(F) — 'parang bersarung hitam'), as stated in the police reports (P10 and P11).

[7] Subsequently on 21 March 2014, ASP Azmi Shah bin Abd Aziz ('PW9') sent the exhibits for example, amongst others, blood specimen of the deceased, nail clipping of the deceased, shirts, jeans, shorts, slippers and weapons (P41–P47, 'P49'–'P58') to the science officer at Chemist Department, Dr Yuvaneswari Chandramoulee Swaran ('PW6') who conducted analysis of DNA with the tests certified by 'American Society of Crime Laboratory/Laboratory Accreditation Board'. After completing the analysis, PW6 produced the chemist report ('P34') and returned the relevant exhibits to ASP Ravi s/o Prumal on 14 November 2014.

TRIAL WITHIN TRIAL

[8] The prosecution sought to adduce the statements ('IDP99', 'IDP100' and 'IDP101') of three witnesses who could not be called upon to give evidence in the trial under s 32(1)(i) of the Evidence Act 1950 for the admissibility of those statements (made under s 112 of the Criminal Procedure Code in the course of investigation). The three witnesses were:

(a) Samri bin Hamanshah ('the first witness') and his statements is IDP99;

(b) Iqbal bin Lahideh ('the second witness') and his statements is IDP100; and

(c) Lan bin Sumeng ('the third witness') and his statements is IDP101.

[9] The counsel on behalf of the accused objected to such admissibility and thus I ordered three separate trials within this trial to determine the admissibility of the three statements as afore mentioned.

[10] As propounded in the case of *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220, the piece of the evidence would be regarded as hearsay when the object of the evidence is to establish the truth of what is contained in the statement. It is the fundamental rule that hearsay evidence is inadmissible as proof of fact which has been stated by a third person. In this situation, s 32 of the Evidence Act 1950 is an exception to this general rule, which the statement becomes admissible provided the maker cannot be found after the prosecution had exercised all the necessary attempts and steps to trace the maker of the statements.

[11] In the three trials within the trial, the prosecution called PW9 (as 'PW1' in each trial within a trial), as the only witness to give evidence and after having considered his testimony, this court ruled that the statements ('IDP99', 'IPD100' and 'IDP101') are not admissible and the reasons are as follows.

The statements of the first witness ('IDP99')

[12] To the first witness' statement ('IDP99'), as shown in PW1's investigation diary ('P87'), the police had failed to conduct a prompt investigation since he had taken too long a time that is after two years before any attempt to trace the witness is taken. PW1 admitted that he had not taken any step to locate the said first witness from 8 May 2014–17 January 2016.

[13] Other than that, the advertisement to locate the first witness was only made for a single time, ie on 24 February 2016 and there was omission when advertising it without the last known address of the said witness. Failure on the part of the police to publish the said advertisement more than one time to give opportunity to the members of the public to assist in giving information in locating the first witness is considered as lacking in efforts on the part of police or prosecution.

[14] It was also grave lack of diligence on the part of PW1 when he failed to investigate the whereabouts of the first witness thorugh his sister, Turi bt Hamanshah and his father, Hamanshah bin Sidera which also be done through other channels such as telco details, EPF and immigration as well as failure to interview the family members. Also, a bond under s 49 of the Criminal Procedure Code ('P76') to secure the attendance of the first witness was issued and executed without any surety. At least an effort to locate the witness through

the surety could be done if there was none.

[15] Therefore, I ruled the prosecution did not meet the requirements of s 32 of the Evidence Act 1950 (*Public Prosecutor v Mogan Ayavoo* [2004] 3 CLJ 623).

The statements of the second witness ('IDP100')

[16] To the second witness's statement ('IDP100'), PW1 had knowledge about the second witness who was imprisoned for other offence and known to be released from the prison on 23 April 2014 but he still failed to ensure the attendance of the second witness in this criminal trial against the accused.

[17] Further to that, PW1 had sent a letter ('P90') to the Immigration Department to apply for information about the status of the second witness but the word of 'Bangladesh' within the letter was deleted and replaced by handwriting of 'Indonesia'. Whereas referred to the letter in reply from the Immigration Office ('IDP89'), it could be seen that the word 'Bangladesh' was written instead of the word 'Indonesia'. This showed a serious miscommunication between PW1 and the Immigration Office, which resulted in failure to find the second witness. PW1 also did not advertise in newspapers for tracing this missing witness and no correspondence was made to the Indonesian Embassy to check the status of the second witness.

[18] Nevertheless, PW1 stated to his knowledge there was no deportation order made against the second witness and thus there is possibility that the second witness could still be in Malaysia. PW1 failed to make a reasonable search of the second witness since he had only written the letter to the Immigration Office on 17 February 2016, and not before 23 April 2014 ie the date of release of the second witness from the prison. This court is guided by the case of *Public Prosecutor v Norfaizal bin Mat (No 2)* [2008] 7 MLJ 792, wherein Low Hop Bing J (as he then was) said:

> [13] *It is necessary for the prosecution and the police to make diligent search and reasonable exertion* in order to procure Azril, otherwise the court is unable to come to a finding that Azril could not be found, in which case, his statement is inadmissible under s 32(1)(i). Mere ignorance of the whereabouts of Azril is not sufficient to invoke the section, see *Lam Peng Hoa & Anor*, at pp 413–414 per Kang Hwee Gee J.
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> [14] *Alternatively, there must be evidence that Azril cannot be procured as a witness without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable*. (Emphasis added.)

[19] Pursuant to the above, this court found that the prosecution had failed to prove that the second witness could not be found. Alternatively, there was an inordinate and excessive delay of time for the PW1 to exercise steps to secure the attendance of the second witness for this trial. Hence, requirement of s 32 of the Evidence Act 1950 was also not fulfilled resulted in the statements held to be inadmissble.

The statements of the third witness ('IDP101')

[20] In view of the facts adduced, the court found PW1 had not made a proper and reasonably practical effort to trace the third witness since he had mistakenly written the name of third witness ('Lan bin Sumeng') as 'Lan bin Sumang' together with the date of the sentence was wrongly to be recorded as '22/4/2014' as the actual date was '25/3/2014' in the letter ('P93') to the prison asking for the status of the said witness. These mistakes had caused difficulty in procuring the attendance of the third witness for this trial.

[21] PW1 also told the court that he had made written application ('IDP97') to the Immigration Department at Eviction Unit on 7 May 2016, which was a week ago before the third witness was scheduled to give evidence in this trial. It is dilligent that the application should have been made much earlier, and not at the eleventh hour as done by PW1 herein. This court found that in fact a more serious effort is warranted for PW1 to procure the third witness to this murder trial.

[22] That being the case, this court ruled that the there were unreasonable amount of delay and lack of efforts on the part of PW1 in taking attempt to procure the presence of this witness and therefore the statement ('IDP101') was held to be inadmissible under s 32 of the Evidence Act 1950.

[23] In the case of *Public Prosecutor v Lee Jun Ho & Ors* [2009] 3 MLJ 400, it was held that:

> [13] Section 32 of the Evidence Act 1950 is an exception to the general rule that hearsay evidence is inadmissible. *Under s 32(1) of the Act, one of the circumstances under which such a statement becomes admissible is where the person who made the statement 'cannot be found'. This was the basis upon which the prosecution tried to invoke when they attempted to produce and tender ID66 and ID67*. For a witness to be clothed as 'who cannot be found' within the meaning of s 32(1) of the Evidence Act 1950, such determination is a finding of fact, of which the onus is upon the prosecution to prove ...
>
> [15] There was no attempt to fully utilise the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses. *The police failed to invoke the provisions of Criminal Procedure Code; which empowers the court to issue a warrant in lieu of or in addition to summon a witness and to require*

that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provisions of s 396 of the Criminal Procedure Code whereby the public prosecutor may apply to court for any witness of any sizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial. (Emphasis added.)

Failure on the part of the prosecution to discharge the abovesaid onus had made this court to rule the three statements to be inadmissible at this trial.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

Preliminary proof of the ingredients under s 300 of the Penal Code

[24] The prosecution in this case relied on the s 300 para (c) of the Penal Code to prove that the accused had inflicted the injury intentionally which was sufficient in the ordinary course of nature to cause the deceased's death.

[25] Guided by the case of *Mahadzir bin Yusof & Anor v Public Prosecutor* [2011] 1 MLJ 297, this court had assessed and decidde the matters such as: (i) what were the bodily injuries that were present on the deceased's body; (ii) what were the natures of the injuries; (iii) were the injuries sufficient in the ordinary course of nature to cause death; and (iv) did the accused intentionally cause the said injuries on the aeceased.

[26] This court is mindful of the expert evidence given by the pathologist ('PW1') that the cause of death were the multiple stab wounds inflicted to the heart are fatal in nature. This court accepted the evidence of PW1 as it was clear that the deceased could not have died from natural causes. It was evident that the cause of the deceased's death was not accidental (*Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222; [2014] 1 CLJ 433).

[27] However, in the context of the factual scenario, this court could not find conclusive evidence, for instance through PW7 who was suspicious about a group of teenagers who were drinking and spoke in 'Bahasa Sabah and Indonesia' and had been acting so aggressive and caused disturbances to the customers inside the pub. PW7 had not witnessed the fateful event outside the pub. Moreover, this court could not find any circumstantial evidence produced by the prosecution to indicate any wrongful conduct of the accused at the pub to close the gap in this case, as stated in the judgment by Ong Hock Thye Ag CJ (as he then was) in the case of *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 (FC):

A ... the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. *Irrespective of whether the court is otherwise convinced in his own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else* ... (Emphasis added.)

B More importantly, the accused was not conclusively identified to have caused the injuries on the deceased. There was no evidence whether the said teenagers had attacked the deceased or otherwise and whether the accused was amongst or one of the teenagers.

C ISSUES RAISED BY THE ACCUSED

[28] There are three issues advanced by the defence counsel acting for the accused in the trial as follows:

D (1) information leading to the discovery of the weapons such as knife ('P57(B)'), chopper (*parang bersarung merah*) ('P58(E)') and chopper (*parang bersarung hitam*) ('P58(F)');

(2) usage of the vehicle ('P59') bearing registration No CCL 8412; and

E (3) adverse inference under s 114(g) of the Evidence Act 1950.

Issue (1): Information leading to the discovery of the weapons

F **[29]** The accused supplied the information to the police as to where he kept the weapons ('P57(B)', 'P58(E)' and 'P58(F)') inside the vehicle ('P59') and led PW4 to the discovery of the said weapons from the said vehicle. The defence submitted that the discovery of the said weapons ('P57(B)', 'P58(E)' and 'P58(F)') were pursuant to s 27 of the Evidence Act 1950 and disputed the G accused's voluntariness in doing so or whether the whereabout had been known earlier by the police before the accused's disclosure of such information and therefore had failed to comply with the requirement of s 27 of the Evidence Act 1950 (*Mustapha bin Awang Besar lwn Pendakwa Raya* [2015] 3 MLJ 347; [2015] 1 LNS 52; *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* H [1994] 2 MLJ 576; [1992] 3 CLJ Rep 408).

[30] This court had allowed the counsel's application to expunge the phrases 'yang saya gunakan untuk tikam simati di Pelabuhan Klang tempoh hari' from the police report ('P9') as these phrases are prejudicial and inadmisibble in I evidence where s 27 of the Evidence Act 1950 is to be invoked (*Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507).

[31] Short of fulfilling the requirements for the evidence to be admissible under s 27 of the Evidence Act 1950, this court still considers the evidence of

the discovery of the weapons by the police as these evidences are relevant to the facts in issue in this trial.

[32] Be that as it may, the evidence of the discovery of the wapons are not significant because there was no detection of any DNA profile or fingerprint found on the said weapons.

Issue (2): Usage of the vehicle ('P59') bearing registration No CCL 8412 ('P59')

[33] It is noted from the evidence by Chong Min Fah ('PW8'), an employee of YIH Construction Co that:

(a) the accused was an employee of the same company with him and the accused was authorised to use P59. However, there were occasions when other foremen could use P59 during office hours to buy foods or goods for their purpose. The accused could also bring back P59 to his house after work;

(b) PW8 had testified that when P59 was parked inside the company, the key would remain in the vehicle and there are possibilities that other persons could have driven the said vehicle for their own purposes; and

(c) from this unchallenged fact, this court found that the accused was not the only person having the custody and control and usage of the vehicle ('P59'). Even the weapons were found in the said vehicle, it did not point to the accused alone to have placed them there.

[34] At this juncture, this court had also considered the available evidence which did not show positively that the accused was using and had driven the vehicle (P59) on the fateful day as circumstantial evidence to link the accused for offence as charged (*Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322). When viewed as a whole, there was no evidence produced by the prosecution that the accused was the driver and having absolute custody and control over P59 at that material time.

Issue (3): Adverse inference under s 114(g) of the Evidence Act 1950

[35] The prosecution had made application under s 32(1)(i) of the Evidence Act 1950 to this court for the admissibility of the statements under s 112 of the Criminal Procedure Code ('IDP99', 'IDP100', 'IDP101') by three above mentioned witnesses. But this court had ruled against the admissibility of those statements.

[36] It ought to further note that the prosecution had failed to show adequate effort or diligent search to be made in order to track down and procure the said witnesses, especially when the second and third witnesses were convicted under s 6(1)(c) of the Immigration Act 1959/63 and it should be the duty of PW9 ('investigating officer') to locate them for this trial, but he failed to secure their attendance. Failure to make necessary efforts to trace these witnesses had failed to fulfil the condition precedent contemplated under the said s 32(1) of the Evidence Act 1950 on one hand (*Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200).

[37] On the other hand, when these witnesses are important to close the gap of the prosecutions's case, it is the duty of the prosecution to take all necessary measures to secure the attendance of the witness for the trial (*Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50). In the circumstances of this case, I ruled that adverse inference under s 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution for non-calling of the three witnesses who were material witnesses for the prosecution as it was clear that evidence of these witnesses are material to the prosecution's case as evidences to prove the murder charge ('P2') against the accused.

[38] This court is fully aware of the principle as enunciated by the Federal Court in the case of *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1 (FC) that:

> [57] *The power of the court to draw an adverse inference under s 114(g) of the Evidence Act 1950 is discretionary. It depends on the circumstances of the case and particularly in cases where the material witnesses are not produced* (see *Lau Song Seng & Ors v Public Prosecutor* [1998] 1 SLR 663). The scope of s 114(g) has been explained by the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494:
>
> > ... It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. *Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.* (Emphasis added.)

[39] Having considered the evidences before me, the case for the prosecution had material gaps and I am of the view that the calling of the three witnesses whose evidences are material to assist this court to arrive at a correct finding as their evidences could throw some lights as to what had happened at the scene, whether the accused was present at the scene, whether the vehicle was used by the accused to go there and what transpired during the recovery of the weapons and many other lingering doubts. Therefore, the non-calling of these three witnesses are fatal to the prosecution's case.

CONCLUSION

[40] After maximum evaluation of all the prosecution's evidences, this court found that the prosecution had not established a prima facie case against the accused (*Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457). The prosecution had so far proven the identity of deceased who have died, cause of the deceased's death are the injuries in the ordinary cause of nature could have died but failed to establish that the accused had caused the said injuries on the deceased. There are lingering doubts as to the involvement of the accused or the others who were arrested by the police in the fatal incident that morning. Therefore, based on the above findings, this court decided to order an acquittal and discharge against the accused without calling for his defence.

Accused acquitted and discharged without calling for his defence.

Reported by Dzulqarnain Ab Fatar